United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1080

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 7 1080

UNITED STATES OF AMERICA:

Appellee,

vs.

ALLAN B. DOUGLASS,

Appellant,

On Appeal from Final Judgment
of the United States District
Court for the Southern District
of New York
Sat Below: Knapp, U.S.D.J., and
a jury

BRIEF FOR APPELLANT

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I N D E X

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STATEMENT OF QUESTIONS PRESENTED

1. Did the Court err in not dismissing the fourth count of the indictment in view of the fact that the money was given after the appellant had already performed his official act and the element of a corrupt bargain was either absent or unprovable?

2. Was not the defendant deprived of a fair trial in regard to the fifth count of the indictment by the incorrect statement of the date of the alleged offense in the indictment coupled with the Government's wilful failure to supply the correct information?

3. Did the Court's erroneous view as to what constituted bribery as to the fourth count act to unfairly deprive the appellant of his argument, on all the other counts, that at most he was only guilty of taking unlawful gratuities?

STATEMENT OF THE CASE

The defendant Allan B. Douglass was charged in a nine count indictment concerning his receiving various amounts of money in return for being influenced in the performance of his official duties, to wit, permitting certain federal prisoners confined at the Woodward FCTC to be absent from the Woodward FCTC at certain times when their presence therein was required by the rules and regulations of the United States Bureau of Prisons, 18 U.S.C. Section 201 (c).

The first count charged Mr. Douglass with receiving $10.00 on February 6, 1975. The second count charged Mr. Douglass with receiving $50.00 on February 13, 1975. The third count charged Mr. Douglass with receiving $25.00 on February 25, 1975. The fourth count charged Mr. Douglass with receiving $25.00 on February 27, 1975. The fifth count charged Mr. Douglass with receiving $50.00 in and around December 1974. The sixth count charged Mr. Douglass with receiving $10.00 in and around February 1975. The seventh count charged Mr. Douglass with receiving $10.00 in and around February 1975. The eighth count charged Mr. Douglass with receiving $10.00 in and around February 1975. The ninth count charged Mr. Douglass with receiving $5.00 on February 27, 1975.

The case came on for trial before the Honorable Whitman Knapp and a jury on December 2, 1975. The trial continued on December 3rd and 4th and on December 5th when the defendant was found guilty on the 4th and 5th counts of the indictment.

On January 20, 1976, Mr. Douglass was sentenced to a 2 year jail term. It is from that judgment that this appeal is taken.

STATEMENT OF FACTS

Mr. Matthew Walsh testified that he is employed by the United States Justice Department, Bureau of Prison as associate warden of the Community Treatment Centers in New York City (25). The function of this Halfway House program is to enable people who are nearing completion of their sentences to more easily make the transition from the closed confines of an institution to the complete freedom of the streets (26). Prisoners may be transferred from an institution to a treatment center and while spending their last months there, be encouraged and helped to go out, find work, become reintegrated into the community and with their family again, start employment, and yet still be under the supervision of the Federal Bureau of Prisons (27). There are requirements about residents sleeping or spending a certain number of hours at the Halfway House itself and they would depend on the specific unit and the individual (27).

Mr. Walsh knew Mr. Douglass, the appellant, as an employee of the Federal Bureau of Prisons who was working at Woodward FCTC as a correction counselor and who was employed as such from November 1974 until March 5, 1975 (28). Mr. Walsh also identified a Mr. John a/k/a Jack Twomey as the guard who worked the

morning watch at the Woodward (28).

Mr. Douglass was the regular officer on the evening watch, 4 P.M. to midnight (29). Mr. Twomey worked the morning watch, midnight to 8 A.M. (29).

Mr. Walsh then identified Government's Exhibit "1" as the Rules and Regulations given to the residents upon admission to the facility (29). Mr. Walsh then identified Government Exhibit "2" as an acknowledgment of a receipt of the rules and regulations by Michael J. Hardy (31-32) and Government Exhibit "3" as an acknowledgment of a receipt of the rules and regulations by Peter La Froscia (32). Both were residents of the facility (32).

The witness explained that when people are first admitted to the facility, they come through the Intake Unit, and after a period of time, depending on their adjustment, whether they are working, whether they are able and in a better position to take care of themselves, they move to one of the other units (33). As there are some differences in unit programs, there is some lightening or amendment to the rules (34). Mr. Walshs' opinion was that the staff of the facility would be expected in the ordinary conduct of their duty to be aware of these regulations (34). Over objection Government's 1, 2 and 3 were received into evidence (36).

The rules would require an inmate of the Community Treatment Centers to be in the Center generally a minimum of six hours during the week and that rule would apply to the Woodward as well (41).

Government Exhibit "4" was a request for a weekend pass by Michael Hardy, a former resident of the facility (41-44). A weekend pass is a request by a resident for permission to go somewhere for the weekend (42). Mr. Douglass's initials appeared on Government "4" (45).

Government Exhibit "5" was a weekend pass request by Peter La Froscia (45), a former resident of the Center (46). Mr. Douglass's initials also appeared on Government "5" (46).

Government Exhibit "7" consisted of a resident sign-in - sign-out sheet for Peter La Froscia (47) and this also contained Mr. Douglass's initials (48).

Government Exhibit "6" consisted of a resident sign-in - sign-out sheet for Michael Hardy (48) and this also contained Mr. Douglass's initials (49).

Mr. Walsh testified that around the end of 1974 he had a conversation with an Assistant District Attorney in Brooklyn named Aiello who informed him

Hardy, an inmate at the Woodward, was cooperating with the People in a court case (50). Walsh discussed the information received with his assistant, Mr. Bouley (51). Also Hardy's official file at the Woodward contained information concerning this cooperation with the Government (52).

In addition to the sign-in - sign-out sheets there was a log book maintained by the staff (54). Hardy's name was noted in the log book concerning an absence from the center (54). The log book was admitted as to its relevant portions as Government Exhibit "6" (60). On approximately February 12, 1975 Mr. Kaufman worked the morning shift instead of Mr. Twomey (60).

Cross-examination brought out that an inmate having a job would necessitate that he had flexible hours within his unit e.g. having a night job would mean that he didn't report at night but rather during the day or having two jobs would mean that he may be spending less time at the facility (67) or having a medical problem might, depending on the case worker-correction officer's judgment, mean different regulations as to him (67,68). Mr. Douglass as a counselor had such discretion within the regulations to the change the hours that a resident had to report, and within limits to grant passes to residents (68).

The Woodward staff consisted of one man on the morning watch, midnight to 8 A.M. and one or two people on the evening watch, 4 P.M. to midnight, Sunday afternoon through 8 A.M. Friday morning (70,71). No counselor is present from 8 A.M. Saturday until 4 P.M. Sunday and from 8 A.M. to 4 P.M. during the week (71). There are though, administrative staff members present at the Hotel from 8 A.M. until 4 P.M. (72).

If, for example, a man left the Hotel at 9 A.M. to go to work he would sign-out on the pad; there would be nobody there to initial it at that time (74). The witnesses attention was then directed to La Froscia's sign-in - sign-out sheet which contained a series of post 8 A.M. sign-out times (79-80).

It was likely that the information Bouley had received about Hardy's cooperation with the Government was known to Douglass (82,83).

Hardy had a late curfew, 1 A.M. which was outside the regulstions specified in the Intake Unit (84). At 1 A.M. the hotel was staffed by John Twomey (85) who worked midnight to 8 A.M. (86). It would be Twomey who signed Hardy in, not Douglass and if Hardy didn't return it would be Twomey who would catch him Douglass wouldn't know about it until someone told him (86).

On February 12, 1975 Mr. Kaufman who replaced Twomey that night reported that Hardy was not present (88). All the persons who were absent that night were placed on restriction (90).

Mr. Douglass was always prompt and did his work properly and efficiently and the witness had no problems with him (91,92).

If a resident's regular residence was a great distance from the hotel he might have special hours (92) and Hardy lived in Spring Valley (93).

On re-direct Mr. Walsh testified that until the present case arose he considered Mr. Douglass a good correctional officer in terms of dependability, assuming responsibility and willingness (94).

Also Hardy would still be required, on a regular basis, to be in the hotel about six hours a day (98). Also a man working two jobs, or who had a medical problem, would still be required to spend a minimum of six hours sometime in the day of night at the center (99).

Peter La Froscia testified that he is employed by LaFroscia Construction and P.J. Auto Salvage (112). He has worked for the Construction Company since December 18, 1974 and works from 8 A.M. to 5 P.M. and for the Auto

Salvage firm from 7 P.M. to 11 P.M. and has been since January, February 1975 (113). His previous night job in January 1975 was with Kings County Collision, where he worked from 10 P.M. to 1 A.M. four days a week (114).

Mr. La Froscia was named as a defendant in the indictment in this case. However, he plead guilty to a misdemeanor information rather than the felony indictment (114). He had not yet been sentenced on his plea to the charge of supplementing the salary of a federal official which he took before Judge Knapp (115).

Mr. La Froscia also admitted a previous conviction for importing hashish into the country in 1973 (115,116). He was convicted after a jury trial in this same courthouse and he had testified under oath at his trial (116). He did not tell the truth when he testified (116). He received a two year sentence to run concurrent with two years special parole (117). He served the sentence at Danbury and Allenwood Federal Prisons and after Allenwood he went to the Federal Community Treatment Center (117). He first went, approximately December 18, 1974, to the Clark Apartments on 31st Street (117). After that he went to the Woodward Hotel on 55th Street; that was around December 20, 1974, before Christmas (118). He stayed at the Woodward until March 6, 1975 (118)

La Froscia stated he received a copy of Exhibit "I" the rules and regulations at the Clark (118,119). He knew the rule was that he was supposed to be at the Woodward for at least six hours at night or some time during the day (119). He also identified Exhbiit "3" as his signed receipt for the rules (120). He identified Exhibit "5" as a form that is signed when you get your weekend pass (120). He identified Mr. Douglass's initials on the form (120). He identified Exhibit "7" as his sign-in - sign-out sheet which also contained his signature (121) and Douglass's (122).

La Froscia stated that Douglass was in charge of the Halfway House when he was there (122). La Froscia did not know any John or Jack Twomey (123).

Some time after the New Year's holiday, January 1975, the witness testified that he had a conversation with Mr. Douglass in Douglass's office (123). Only he and Douglass were present and the witness told Douglass that he was having a hard time getting to and from the Halfway House and he wanted to know if there was anything that could be done, and the witness thereupon put an envelope containing money on the desk; Douglass said "Well, we will see what we can do" and La Froscia left. He saw Douglass pick up the envelope which contained $50.00 (124) but he didn't see him remove anything (137).

The next night the witness had another conversation alone with Douglass when he came in and signed the book, as he put down his in-time, Douglass told him that he could sign out at the same time. He did, Douglass initialed it and the witness went home (125).

Prior to that date the witness always had to sign in and stay at least six hours before he could sign out (125) and if he had left when no one was there, no one initialed it although it was usually initialed by Douglass before his return (126).

After that day the witnesses practice was to come in, sign in, and sign out at the same time and then go home (126). Thereafter he would only stay overnight at the Center if Mr. Douglass wasn't on, maybe once or twice total (127).

He next gave Douglass money, $10.00, about two weeks later (127,128). There was no conversation when he gave Dougalss the money in his office (128).

The next week he also came in, signed in and out and gave appellant $10.00 (129). He gave appellant money twice more, once $10.00 and on the last Monday he was there, $5.00 (130).

On January 20, 1975 at approximately 6 P.M. the

witness had a conversation with Michael Hardy. He knew Hardy from Danbury. The conversation was by telephone (130).

On cross-examination the witness also admitted that in February, 1971 he was convicted of possession of a weapon (131). On February 9, 1972 the witness admitted that he bought a car that turned out to be stolen (134). In his trial for smuggling hashish, 250 pounds of it (156) the witness admitted he lied under oath in an attempt to get himself off (135). In this case he admitted making a deal with the Government whereby he got a misdemeanor plea in exchange for testifying (135). And he hopes that the result of his testimony will be that he won't be sent to jail (137).

La Frossia never saw the guard who was on duty on the morning shift (140), even when he signed out at 3:40 A.M. (143). On January 13, 1975 the witness received an extension of his curfew because he was working two jobs (144). When he started his second job it was his practice to come back to the hotel and then sign out again and go to his second job (145). He worked the second job until 1 or 2 A.M. (145). He didn't go back to the hotel at 1 or 2 A.M. so he never met Mr. Twomey (145,146).

Over defense objections (151-153) the prosecutor

asked the witness about his January 20, 1975 telephone conversation with Michael Hardy (152). He replied that Hardy called him and proceeded to tell him how bad things were for him and how hard it was for him to get into a Halfway House and get a job and he asked if anything can be done at the Halfway House that he might be able to get out of it. La Froscia at first told him no (153), that he couldn't help, but when Hardy kept persisting La Froscia told him what he had done and told him that he had to give Mr. Douglass at least $50.00 when he got there (154).

On re-cross La Froscia admitted saying in the course of the conversation that he didn't think Douglass would go for it and also that he didn't know how far Hardy would get with it and then that he finally said that he gave this guy $50.00 (155). He said that he put $50.00 in his hand and shook hands with him (157).

On re-direct the witness remembered that in the same conversation he told Hardy something about giving the money in an envelope (159). Thereafter La Froscia gave Douglass the money in his hand (160).

Michael J. Hardy testified that his first conviction was on May 20, 1964, in Brooklyn, for armed robbery (174,175). He was sentenced to 2½ to 5 years, suspended, as he had a case pending in another state

(175). His next conviction was on February 15, 1965 in Jersey City for armed robbery (175, 176). He received a five year sentence and served two (176). His next conviction was in 1973 in the Southern District of New York for conspiracy to organize vehicle theft and he received a five year sentence and served three (177). Then the witness recalled a previous conviction for counterfeiting and murder in April 1968 in Mexico for which he received a five year sentence (177). Also in 1973 he was convicted of armed robbery in New York County (179) and in September 1974 he was convicted in Brooklyn for armed robbery and kidnap (179).

In August-September 1974 Hardy testified in a State Grand Jury against the people involved with him in the car ring and a double murder in Brooklyn (180). At that time he was in Danbury Federal Prison (181).

On December 11, 1974 he was transferred from Danbury to the Clark Apartments (181). From there he went to the Woodward (182). Hardy identified John Twomey as the officer on the 12 to 8 shift (183). Hardy knew the rules and regulations of the Center (184). Hardy identified a number of the initials on Exhibit "4" as Douglass's (184-186).

On January 17, 1975 Hardy had a meeting at the office of the First Deputy Commissioner's Special Forces (187-188). Present were members of the New York City Police Department and the Federal Bureau of Investigation. The result of this meeting was an investigation into the goings-on at the Woodward Hotel (188).

On January 24, 1975 Hardy, at the Special Force office, had a telephone conversation with Peter La Froscia. The conversation was recorded by the agents present (189). Over objection Hardy testified as to this conversation (190). Hardy testified that he asked La Froscia if he could speak to the appellant and put the fix in for him and that he would be willing to pay for it. La Froscia said he would try but he didn't know if he could do it (190). Thereupon the Court requested that the tape be played as the best evidence (191).

The witness identified the tape, Exhibit "14" and its transcript Exhibit 14-A (192-193) and the tape over objection (191) was admitted (195) and played for the jury (199). Hardy stated that by the word "program" he meant paying off so he wouldn't have to come in (200).

On January 21, 1975 Hardy was again at

the Special Force office with the various officers and agents (200) and he consented to be wired with a Kel transmitter and a NAGRA tape recorder (201). He then went to the Woodward and had a conversation with Douglass in Douglass's office (202).

Douglass first asked if Hardy had the rent money and then Hardy stated that he wanted to get into the program, that he didn't want to be obligated to show up, that he had spoken to others and they all told him to speak to Douglass (203); Douglass said there was no such thing as not coming in, that he can't give nights away anymore, that his new boss, Mr. Walsh, is a tough man. While this conversation was taking place Hardy was holding $50.00 in his hand. Douglass asked him what he needed and Hardy said he had a long way to travel and Douglass said he would do everything (204) he could. Douglass then remarked that if he was not taking the money there was a reason and Hardy put the money back into his pocket and later returned it to the officers (205). Hardy then identified Exhibit "8" as that recorded conversation and "8-A" as the transcript (206) and over objection it was admitted (207) and played to the jury (212).

On February 3, 1975 Hardy was again at the Special Forces office (209), again he was wired and

again went to the Woodward to talk alone with Douglass (210,212). The witness recalled that Douglass told him that he owed rent money and Hardy said he would pay Twomey. Hardey then stated that showing up at the Halfway House was becoming a hassle, that he had a long way to travel and he wanted to pay him so he wouldn't have to show up to spend the night there (213). Hardy then identified Exhibit "9" and "9-A" as the recorded tape and transcript of this conversation (214,215) and the tape was played (217).

At this point it was stipulated that if Mr. Walsh was recalled he would testify that among Mr. Douglass's responsibilities was the duty to collect rents (216) from the residents for their rooms at the Woodward (217).

During the course of the February 3, 1975 conversation Hardy again took money out and offered it to Douglass, but Douglass refused saying that if he wasn't accepting it there was a reason. Hardy then put the money back in his pocket and later returned it to the agents (218).

On February 6, 1975 Hardy was again at the Special Force office (218), again was wired and again went to the Woodward to talk to Douglass (219) alone (220). Douglass told him that he was giving him a

weekend pass and Hardy would not have to be back until Monday. Hardy said thanks and also "here's $10.00" Mr. Douglass" and placed it in Douglass's hand and Doublass put it in his pocket. Hardy then identified Exhibit "10" (221) as the tape of that conversation and "10-A" as the transcript (223) and it was admitted (223) and played for the jury (227). Defense counsel noted that the critical part of the tape, the transfer of money, was inaudible and the Court agreed (228), however, the Court overruled defendant's objection to the tape's admissibility (228).

On the night of February 12, 1975 Hardy did not go to the Halfway House but spent it with his girl-friend in Brooklyn. On February 13, 1975 (224) Hardy was again at the Special Force Office, again was wired and again went to the Woodward (225) and Mr. Douglass's office (226).

Douglass told him that Twomey had been out sick and his replacement (253) had conducted a count and that Hardy had come up missing and that Douglass was going to have to put him on restriction. Douglass told him he would have to go down to the 31st Street House the next day and stay there 12 hours. He said there was no getting out of it (254). Hardy then thanked Douglass for speaking to Walsh about not reporting

Hardy as an escapee. Douglass said he couldn't do anything more for him and Hardy took $50.00 out and said "Here's $50.00" and put it on the desk. Douglass said "I'd rather not take this, Hardy" (255) and Hardy said it was up to him. Hardy then said Douglass picked up the money and put it in his pocket. Hardy identified Exhibit "11" as this conversation recorded, (256) and "11-A" as the transcript (257) and the tape was played to the jury (258).

Hardy testified that he was receiving $20.00 a week from the F.B.I. from January 20th until February 27th (262,263) and $12.50 a week for the rent and that from time to time a Special Force officer would give him some money, though never more than $10.00 a week (263).

On February 25, 1975 Hardy again went to the First Deputy Commissioner's office, was again wired (264) and received as usual a specific sum of money. He then went to Mr. Douglass's office and had a private conversation with him (265).

Douglass told him that Walsh had made a reference to the fact that Hardy was signing in and out without spending the proper amount of time in the House and Douglass noted that Hardy was just getting over that past thing and now he was here with this, Douglass stated

"you got to try to come in and sign in properly . Douglass said the boss was looking hard at Hardy and that Hardy had only two more weeks and that Hardy had better work at it (266). Hardy thanked him for smoothing things over with Walsh and then added "here take this $25.00", that ended the conversation. Douglass, according to Hardy, took the money in his hand and put it in his pocket. Hardy identified Exhibit "12" as the tape recording of that conversation (267) and "12-A" as the transcript (268) and the tape was played (269).

On February 27, 1975 a Thursday, Hardy again was at the Special Force office (269), again was wired, again given money and again went to Mr. Douglass's office (270) and had a private conversation with him. Douglass told him that he was going to let him go on a weekend pass starting that night. Hardy stated that he really appreciated that and then said "here's $25.00, take it, I really appreciate the favor you are doing me". Douglass told him to be back Sunday night and that he wasn't to get into any trouble and Hardy said again "here's $25.00, take it" and Douglass said "okay". Hardy put the money into Douglass' hand and Douglass put it in his pocket (271). Hardy identified Exhibit "13" as the tape recording of this conversation and "13-A" as the transcript (272) and the tape was played (274).

On cross-examination Hardy also admitted that in July 1963 he had been convicted in New Jersey of possession of a concealed deadly weapon (275) and also in 1963 he was convicted of petit larceny (276). In 1968 he had been arrested in New York for armed robbery but had escaped and fled to Mexico (281). He had also gone AWOL from the army and had been court-martialed (289).

Hardy had cooperated with law enforcement officials on two previous occasions and this cooperation had not been motivated by any hope of getting a reduction in sentence (281), no promises were made to him, although of course he was hoping for the best (282), however, he also remembered asking the AUSA to tell to his probation officer that he was cooperating (284). The other occasion he informed the U.S. Attorney's office that he wanted a reduction of sentence and that was why he was motivated to cooperate (285).

Hardy admitted that he was testifying in this case so his parole time would be reduced (290) and that he was receiving, all told, $155.00 a week (291). Hardy stated though, that he testified in the Brooklyn case because it was his civic duty (294). Although, if the District Attorney had sent a letter to the Parole Board recommending his parole be shortened, it was all-

right with him (300,301). Hardy also admitted an attempt to escape from the U.S. Attorney's office when he thought they might be sending him back to prison (298).

After the witness spoke to Douglass the first time and Douglass refused the money the witness later that night spoke to Twomey (305) and immediately made a deal with Twomey, saying he would give him $50.00 now and $25.00 a week (306) and Twomey continuously accepted these weekly payments (309). The witness also testified that on February 14, 1975 after he had already given money to Douglass he told Twomey that he and Douglass had nothing going (310).

The witness also admitted that during his taped conversations with Douglass he often left Douglass' office to go to the bathroom or his own room (312). And if he went to his own room, which was three doors down from Douglass's office (315) about 13 feet (328), he would be by himself (314). It was Mr. Bouley who assigned Hardy the 1 A.M. curfew (315). On re-direct Hardy stated that he had been told by the F.B.I. and police (336,337) to tell Twomey that he had nothing going on with Douglass (332,333).

Hubert Erwin testified that he is a Detective

in the New York City Police Department (342) and assigned to the First Deputy Commissioner's Special Force (343) and on January 21, 1975 he equipped Hardy with a Kel transmitter and a Nagra recorder and provided him with currency and recorded the serial numbers and made xerox copies of the bills (344) and after that followed Hardy to the Woodward Hotel and monitored his conversations (345). This procedure was repeated on February 3, 1975, February 6th, February 13th, February 20th and February 27th (347). However, on the 6th, 13th, and 27th Hardy did not have the money he had when he went into the Woodward, although on February 27, 1975 he did have the $15.00 that he was given for rent. The witness identified Exhibit "19" as the xerox copy of the $25.00 currency given to Hardy on the 27th (348). On cross-examination the witness conceded that he had no visual communication with Hardy and couldn't tell if in fact Hardy hadn't put the money given him in his room (351).

David Powers testified that he is a sergeant in the New York City Police Department (352,353) and is assigned to the First Deputy Commissioner's Special Force (353). He identified Exhibits "20", "21", "22" and "23" as bills he had initialed on February 28, 1975 as currency found on Mr. Doublass (355) when he emptied his pocket at the United States Attorney's office when he was brought

in (356). These Exhibits matched Exhibit "19", the xerox copy of the currency given to Hardy on the 27th (357).

The Government rested (357). The defense rested (358). Defendant's motion to dismiss the Government's case for failure of proof beyond a reasonable doubt was denied (488). Defendant's specific motion to dismiss Count 5 as not being proven was also denied with an exception (489).

POINT I

THE JUDGE COMMITTED ERROR IN NOT DISMISSING THE FOURTH COUNT OF THE INDICTMENT AS THE BRIBE GIVEN AFTER THE APPELLANT HAD ALREADY ACTED, WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

POINT II

THE JUDGE'S ERRONEOUS VIEW AS TO WHAT CONSTITUTED BRIBERY ACTED TO UNFAIRLY DEPRIVE THE APPELLANT OF HIS ARGUMENT ON ALL THE OTHER COUNTS THAT AT MOST HE WAS ONLY GUILTY OF TAKING UNLAWFUL GRATUITIES.

The question that was presented to the Court was could a public official be convicted of taking a bribe in a situation where he had already acted, ie, issued a weekend pass, and then received appreciation in the form of $25.00.

In the arguments of counsel (365-383) the appellnat's counsel took the position that according to the statute, the indictment and the facts of the case some sort of influence on Mr. Douglass's behavior would have to be shown (370). ie. (1) the indictment alleges that the defendant took money in return for allowing federal prisoners confined at the Woodward FCTC to be absent when their presence was required; (2) Hardy was issued the pass before any money was given mentioned (270,271,371); (3) appellant was almost immediately arrested after he received the $25.00 and so; (4) in no way could this money given after the event, be shown to have influenced defendant's behavior before or after the event.

The Assistant United States Attorney argued

that (1) it didn't matter which came first the weekend pass or the bribe so long as the bribe was accepted in exchange for the pass (371) and; (2) that there was a continuing course of conduct, a series of bribes, between the appellant and Hardy and so any given payment could be considered as payment for either something that was about to happen or had happened (374,375). The court adopted the AUSA'S position, the jury need not believe future action was necessary (377).

This was error. The Government's argument on analysis is both wrong and dangerous. The first argument can only serve to emasculate 18 U.S.C. 201 (c), as to interpret the statute in the way advanced would only serve to do away with the legal requirement that the prosecutor must show proof of a corrupt bargain. Now all the prosecutor would need for a bribery conviction was proof that the official took something of value from someone who he once dealt with in an official capacity. And as 18 U.S.C. 201 (c) becomes a monster, 18 U.S.C. 201 (g), "receiving an unlawful gratuity" becomes a nullity. That section states" "Whoever being a public official...otherwise than as provided by law for the proper discharge of official duties...accepts, receives...anything of value for himself for or because of any official act performed

or to be performed by him." (Emphasis added), would make no sense. This section which would clearly seem to cover the situation in point, ie. an official act already performed for which a payment was made after the official action was taken and the element of a corrupt bargain is either absent or unprovable, United States v. Harary, 457 F. 2d 471, 476, fn. 11 (2nd Cir. 1972) becomes devoid of meaning. Cf. Woelfel v. United States, 237 F. 2d 484 (4th Cir. 1956); United States v. Henry, 52 F. Supp. 161 (D.Nev.1943).

The AUSA'S second argument that there was a continuing course of conduct, strikes at heart of the principle that each count, is in realty an individual crime in itself. The prosecutor constructs a house of cards consisting of unproven separate crimes and builds until essential elements of the last crime depend on the unproven prior crimes. The only problem was that the jury didn't convict on any of the prior counts. They didn't buy Hardy's story about a course of conduct. The jury's action served only to highlight the prosecutor's mistaken reasoning. Similar allegations might show a prior disposition by the defendant to commit the crime charged but the jury conclusively rejected them as proof which showed the corrupt bargain.

Appellant's conviction of bribery, on the

fourth count, must fall. The prosecutor never proved the corrupt bargain that was necessary to convict. Appellant's counsel's objection to the court's theory was noted (369).

The court here should have dismissed the bribery count as a matter of law and submitted instead a possible violation of 18 U.S.C. 201 (g). However, even if this court should find that the trial court was correct in submitting to the jury the bribery count on the theory that there was a continuous course of conduct, the court had to, as a matter of law, dismiss the count after it became apparent that the jury had rejected that argument.

It is important to note that defendant's counsel fully expected under his view of the statute that the court would charge an unlawful gratuities (367,372). It was only when he realized that by the court's reasoning he was leaving his client open to being found guilty of both bribery and receiving unlawful gratuities, since the court intended to charge on bribery in any case, that he decided to sum up in a manner to avoid any further charge against his client (372,373).

Therefore, the court's mistaken reasoning

as to this count acted to put unlawful pressure on counsel's whole summation and so affected his argument as to all the other counts as well. Counsel, in effect had to waive the substantial argument that Douglass whose position was that of counsellor, with the goal of aiding the reintegration of his residents back into the community, acted honestly and totally within his best judgment in either giving the weekend passes in question or allowing La Froscia to sign in and then out as he went to his second job.

Counsel had a legitimate argument, ie. that at most Douglass could only be convicted of taking gratuities in that the money had no affect at all on his best judgment and discretion. Yet this argument could not be rasied, because if it were, counsel would only succeed in bringing down on the appellant a further charge on the fourth count.

POINT III

COUNT FIVE OF THE INDICTMENT IN INCORRECTLY STATING THE DATE OF THE ALLEGED OFFENSE, COUPLED WITH THE GOVERNMENT'S FAILURE TO SUPPLY THE CORRECT DATE ACTED TO DERIVE THE APPELLANT OF A FAIR TRIAL.

The basic rule is that an indictment, to be sufficient, must set forth all of the essential elements of the statutory offense. United States v. Debrow, 346 U.S. 374 (1953). Rule 7 (c) of the Federal Rules of Criminal Procedure states: "(T)he indictment... shall be a plain, concise and definite written statement of the essential facts constituting the offense charged".

Three broad reasons are usually cited for this requirement: (1) the indictment must sufficiently apprise the defendant of what the details of the alleged offenses are so that he can be adequately prepared to defend himself, United States v. Debrow, supra; United States v. Pommerening, 500 F. 2d 92 (10th Cir. 1974), cert denied 419 U.S. 1088 (1976); United States v. Knox Coal Company, 347 F. 2d 33 (3rd Cir. 1965); (2) the essential facts have to be stated so as to enable the defendant to plead a former acquittal or conviction in any future proceeding against him for a similar offense, United States v. Debrow, supra and; (3) all the essential elements of the crime charged have to be stated so as to assure that the Grand Jury has considered them,

United States v. Goldstein, 502 F. 2d 526 (3rd Cir. 1974); United States v. Denmon, 483 F. 2d 1093 (8th Cir. 1973).

In this case, the indictment by not stating the date of the alleged offense, ie. stating "In and around December 1974" instead of the date that the Government's proof at trial adduced, sometime in January 1975 (123) substantially deprived appellant of a fair trial, by denying him the opportunity to adequately prepare his defense to the charge.

This was not a mere "technical" error. The only "technical" error here was the failure of the indictment to cite the statute which the defendant was alleged to have violated, Fed. Rules of Crim. Proc. 7 (c)(1), however, Rule 7 (c)(3) declares that this omission is harmless. The statute doesn't define as harmless error the failure to state the correct date of the alleged crime.

Appellant could not have attacked this indictment as being insufficient on it's face, as clearly it was sufficient, cf. United States v. Greenberg, 223 F. Supp. 350 (SDNY 1963), a date was stated. Nor did a motion for a bill of particulars solve defendant's problem here as all the Government could supply was a hearsay statement made by La Froscia that he had given appellant $50.00. One may very well ask if this was in fact all

the evidence that the Government actually presented to the Grand Jury on this count. So appellant was placed in the position of having to defend an unspecific count of a multi-count indictment without the hope of getting specific information as to the basic question - when did the criminal act occur.

The Government generally is permitted leeway in alleging the date of an offense and in this case availed itself of this rule and alleged a very broad time period. Yet, as it turned out, the indictment not only misinformed about the month, it also misinformed about the year.

The Government, though, can not say that it didn't in fact, know the exact date of the alleged offense prior to the trial. La Froscia was offered a plea to a misdemeanor in return for his testifying and he took it. Now there was no excuse for the Government's misinformation. The proper procedure was for the Government to resubmit this count to the Grand Jury, cf. Russell v. United States, 369 U.S. 749 (1962), although here, informing the defendant before trial by the amendment of the bill of particulars might have been adequate, cf. United States v. DiZenzo, 500 F. 2d 263 (4th Cir. 1974), however, the Government never gave any notice at all and so because of this defective indictment coupled with the Government's wilful failure to correct it the appellant

never had the opportunity to adequately prepare his defense, cf. Brady v. Maryland, 373 U.S. 83 (1963).

CONCLUSION

WHEREFORE, for the reasons set forth above it is respectfully urged that the judgment of conviction herein be reversed, that the indictment be dismissed or in the alternative that the case be remanded for a new trial.

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